Supreme Court, U.S.
FILED
AUG 22 1980
MICHAEL RODAK, JR., CLERK

No. 80-95

IN THE

Supreme Court of the United States

October Term, 1980

THE ENVIRONMENTAL DEFENSE FUND, THE NATIONAL AUDUBON SOCIETY, THE BIRMINGHAM AUDUBON SOCIETY, THE ALABAMA CONSERVANCY, *et al.*,

Petitioners,

v.

CLIFFORD L. ALEXANDER, SECRETARY OF THE ARMY, THE UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, TENNESSEE-TOMBIGBEE WATERWAY DEVELOPMENT AUTHORITY

HUNTER M. GHOLSON
GHOLSON, HICKS & NICHOLS
Seventh Floor, Court Square Towers,
Post Office Box 1111
Columbus, Mississippi 39701
(601) 327-0662

Counsel for Respondent,
Tennessee-Tombigbee Waterway
Development Authority

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

INDENTIFICATION OF THIS RESPONDENT 1

BRIEF OF THE ARGUMENT 2

I. INVOCATION OF *LACHES* WAS PROPER AND JUSTIFIED TO BAR THE PLAINTIFF'S NON-AUTHORIZATION CLAIMS 2

II. THE PROJECT UNDER CONSTRUCTION IS BEING BUILT WITHIN THE AMBIT OF CONGRESSIONAL AUTHORIZATION AS SET FORTH IN THE AUTHORIZING DOCUMENTS AND IN SUBSEQUENT ACTS OF RATIFICATION BY THE CONGRESS 9

TABLE OF CITATIONS

Arlington Coalition on Transportation v. Volpe, 458 F2d 1323 (4th Cir. 1972) 5

Clark v. Volpe, 342, F.Supp. 1324, aff'd 5th Cir. 461 F.2d 1266 (5th Cir. 1972) 9

Ecology Center of Louisiana v. Coleman, 515 F.2d 860 (5th Cir. 1975) 8

EDF v. Corps of Engineers, 348 F. Supp. 916, (N.D. Miss. 1972) affir'd 492 F.2d 1123 (5th Cir. 1974) 4

Environmental Defense Fund v. Tennessee Valley Authority, 468 F.2d 1164 (6th Cir. 1972) 2,6

Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973) 7

Save Our Wetlands v. Corps of Engineers, 549 F. 2d 1021, rehearing denied 553 F.2d 100 (5th Cir. 1977) 5

Steubing v. Brinegar, 511 F.2d 489 (2nd Cir. 1975) 7

TVA v. Hill, 437 U.S. 153 (1978) 3,4,11

United States v. Dickerson, 310 U.S. 554, 60 S.Ct. 1034, 84 L.Ed. 1355 (1940) 12

U.S. v. Southwestern Cable Company, 392 U.S. 157, 88 S.Ct. 994, 20 L.Ed.2d 1001 12

STATEMENT OF THE CASE

The Petition for a Writ of Certiorari should be denied for two distinct reasons:

1. The invocation of the doctrine of *laches* was proper and justified to bar the claim of the plaintiffs below (that the project under construction is not within the Congressional authorization).

2. The project under construction is being built within the ambit of congressional authorization as set forth by the Congress.

IDENTIFICATION OF THIS RESPONDENT

This response is filed on behalf of the Tennessee-Tombigbee Waterway Development Authority which is a Congressionally authorized compact of the States of Alabama, Mississippi, Tennessee, Kentucky and Florida which, since 1958, has existed to promote and plan the development of the Tennessee-Tombigbee Waterway and its socio-economic impact on the citizens of the member states. The Federal defendants' interest in this litigation is to fulfill their respective duties as officers of the Federal government and to carry out the mandates of the Congress and the Court. The completion of the construction of this Waterway is the virtual raison d' etre of this respondent, so in a very real way its interest transcends that of any other party. This brief, therefore, is filed and funded by the citizens of the five southeastern states whose hopes for a better economic tomorrow depend upon succeeding in thwarting the efforts of the plaintiff-petitioners to halt construction of this long anticipated regional and national asset.

Interestingly, the Louisville and Nashville Railroad is not listed as a petitioner in this Petition for Certiorari although it was the economic interest of the railroad and the alleged lack of knowledge of the railroad of the width increase which formed the bedrock of the arguments in the Courts below that *laches* should not apply.

As indicated by the District Court in its opinion, this railroad has been in and out of the public efforts to halt the Waterway since its early pre-construction studies. Although not an official party to the earlier litigation to halt the Waterway, *Environmental Defense Fund, Inc. v. Corps of Engineers of the United States*, 348 F. Supp. 916 (N.D. Miss, 1972), affirmed 492 F. 2d 1123 (5th Cir., 1974), the rairoad has appeared before Congress and on other public occasions to oppose the construction of a 300-foot Waterway through its own efforts and as Chairman of the Tennessee-Tombigbee Waterway Committee of the Association of American Railroads on and after May 18, 1967. (District Court opinion, page 64a of Petition for Certiorari and Court of Appeals opinion, page 10a et. seq., of Petition for Certiorari).

For reasons best known to it, this litigant railroad has once again furtively stepped into the background to let its flag be carried to this court by the other so-called "public interest" plaintiffs. It remains crystal clear that the purpose of this litigation is to protect the monopolistic interests of the railroad through whatever legal device may be asserted.

BRIEF OF THE ARGUMENT

I. INVOCATION OF *LACHES* WAS PROPER AND JUSTIFIED TO BAR THE PLAINTIFFS' NON-AUTHORIZATION CLAIMS.

The essential point raised by the plaintiffs in the issues tried before the District, appealed to the Court of Appeals, and the subject of this petition was the claim that the Tennessee-Tombigbee Waterway, as being constructed, has never been authorized by Congress. We will dispute the correctness of that contention in the second part of this brief. In this point, we argue that the Trial Court, as affirmed by the Fifth Circuit, properly never reached the question of whether or not the Waterway, as being constructed, was specifically authorized by Congress for the reason that the claim was stale and had been barred from adjudication by the equitable doctrine of *laches*.

It is first important to deal with petitioners' reliance on TVA *v. Hill*, 437 U.S. 153 (1978). The inference throughout petitioners' argument is that this Court in that decision forbade the invocation of the doctrine of *laches* to bar claims asserted against an agency of the United States Government. We respectfully believe that this reliance is misplaced in that *TVA v. Hill* was not a *laches* case. Unlike the present controversy, we understand *TVA v. Hill* to have been this Courts' resolution of a plain conflict between the prohibitions of the Endangered Species Act on the one hand and the appropriation by Congress of money for the construction of the Tellico Dam on the other. The majority opinion, as we understand it, simply held that the Congress could not enact a clearly worded prohibitory statute such as the Endangered Species Act and expect the Courts to ignore the prohibitions with respect to a project for which the Congress has also appropriated construction funds. The staleness of the complaint and the propriety of *laches* are not addressed in that opinion.

In the matter under consideration, there is no contention that Congress, by any enactment, prohibited the construction of the Tennessee-Tombigbee Waterway. It is conceded by all parties that the Waterway was authorized by the Rivers and Harbors Act of 1946 (Public Law 79-525) and that the authorization incorporated by reference the plans and conditions set out in House Document 486 and its predecessor, House Document 269.

Likewise, there is no question but that the authorizing legislation described the Waterway as providing "a channel of not less than nine feet in depth and a minimum bottom width of 170 feet in river and canal sections and 115 feet in the divide cut" in both House Document 269 and House Document 486. The pertinent portions of these authorizing documents are quoted in the District Court's opinion and can be found in the copy of that opinion appended to the Petition for Certiorari on pages 23a and 26a of Appendix C.

There can be no question that there was purported exercise of discretion on the part of the Secretary of the Army to expand the width of the channel in 1967 from 170 feet to 300 feet "so that further planning may proceed on the basis of a 300-foot-wide Waterway". (Plaintiffs' Exhibit 7, District Court Opinion, quoted in Petition, Appendix C, page 39a.).

It is equally clear that a copy of Secretary Resor's memorandum approving the increase in width was forwarded to the Chairman of the House and Senate Public Works Committees and Appropriations Committees, and the Bureau of the Budget likewise advised. (Petition Appendix C page 39a).

As will be more fully developed in Point II of this brief, Congress made a number of susequent authorizing enactments including Appalachian Regional Programs and Federal Highway Corridor Programs, in addition to appropriations legislation, based upon the premise of a 300-foot-wide Tennessee-Tombigbee Waterway. Therefore, we conclude that unlike the situation in *TVA v. Hill* the Court in the instant controversy faces not a resolution of conflicting Congressional mandates but a question of whether or not the plaintiffs below have the current right to litigate the question of the proper width of the Waterway 11 years after the Corps of Engineers and the Congress have both proceeded on the basis of a 300-foot-wide Waterway. (Authorization was not specifically challenged until plaintiffs' Amended Complaint was filed in 1978.)

The Fifth Circuit said in its opinion that *laches* is a clement doctrine and this seems especially appropriate terminology considered in the light of the fact that the present petitioners or their predecessors in this litigation failed to raise any question as to the correctness of the channel width in their 1971 complaint, *EDF v. Corps of Engineers*, 348 F. Supp. 916 N.D. Miss 1972, affirmed 492 F 2d 1123 (1974). In fact, they stipulated that the authorized bottom width for the project was 300 feet except in the actual divide cut where the authorized width was 280 feet. (Petition, Appendix C, page 22a).

Decisions of this Court and its inferior Courts all espouse the principle that the application of the equitable doctrine of *laches* is addressed to the sound discretion of the Trial Court and is to be determined by particular circumstances of the case then before the Court. There is no exemption or special exception with respect to the applicability of this doctrine when public issues, government agency actions or environmental issues are under consideration. The argument that *laches* cannot be applied to environmental issues was urged by the plaintiffs in *Save Our Wetlands v. Corps of Engineers* and flatly rejected by the Fifth Circuit, 549 F. 2d 1021, rehearing denied 553 F.2d 100. This case is factually analogous on the basis of petitioners' present argument that they did not know of the the width increase until shortly prior to the inception of the present litigation. In *Save Our Wetlands* the Fifth Circuit affirmed a finding that given the visibility and publicity of the project under attack the plaintiffs knew or should have known of any illegality and that their delay was therefore inexcusable, 549 F.2d 1021, 1027-28.

Petitioners cite as authority for their proposition that *laches* cannot be applied in a public interest case, such as this, five Court of Appeals decisions. Only one of them could arguably support petitioner's contentions; the other four definitely do not.

Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 (4th Cir. 1972) involved efforts to force reconsideration of the location of Interstate Highway 66 through the metropolitan Washington area of Arlington County, Virgina. This segment of the Interstate Highway system was certainly intended to connect other segments already constructed but the portion as to which the injunction applied was an independent section held subject to compliance with the requirements of NEPA. In balancing the merits and prejudices of injunctive delay the Fourth Circuit panel determined that the equities weighed against *laches*, but not that *laches* was an unavailable doctrine or should not be considered, saying:

> We believe that Arlington I-66 has not progressed to the point where the costs of altering or abandoning the proposed route would certainly outweigh the benefits that might accrue therefrom to the general public. In their reconsideration of the proposed route, the Secretary ... (et al) may decide, of course, that the costs do outweigh the benefits. If the opposite conclusion is a reasonable possibility, however, as it is here, the Congressional declaration of policy in the relevant statutes of the importance of the benefits that might accrue demands that the merits of the question be considered by the appropriate agencies. 458 F.2d 1329-1330.

Environmental Defense Fund v. Tennessee Valley Authority, 468 F.2d 1164 (6th Cir. 1972), cited by the petitioners likewise made a factual determination that under the circumstances existing in that particular case *laches* was inappropriate. The case does not hold that *laches* is not a viable consideration in cases against government agencies. In discussing *laches*, the opinion states:

> To prevail, appellants must show that plaintiffs unreasonably delayed in bringing suit and that appellents were prejudiced and by this delay ... NEPA became effective on January 1, 1970, and this suit was originally filed ... on August 11,1971. We do not believe that this delay was unreasonable ... Two months after this statement (draft Impact Statement) was submitted, after appellees had an opportunity to study it and consult experts of their own, this suit was filed. Under these circumstances appellees' delay was not unreasonable. 468 F.2d 1182.

We respectfully submit that this case in no way supports the petition now being considered.

Petitioners next cite *Jones v. Lynn*, 477 F.2d 885 (1st Cir. 1973), a case which does contain dicta compatible with petitioners' argument. The First Circuit rejected *laches* on three grounds: First, that recently discovered environmental problems arose from deviations from the original proposal; second, the suit arose from an increased relocation grant of August, 1972, which was only seven months prior to the Court of Appeals decision; and third, a factual finding that assumed prejudice to the party sought to be enjoined could not be said to exist under the facts before the Court. 477 F.2d 892. Therefore, we do not believe that the summary of this case put forth in page 12 of the Petition is an accurate analysis of the gravamen of the decision.

Steubing v. Brinegar, 511 F.2d 489 (2nd Cir. 1975) was another decision in which the Court of Appeals reached an individual factual determination that undue delay and prejudice were absent and therefore, *laches* would not be appropriate. The following language from that opinion clearly shows that it does not support the contentions of the petitioners in this case:

> This is not to say that a plaintiff's delay can have no effect on a determination of whether injunctive relief is appropriate. During delay construction may have proceeded to a point where any significant environmental damage has already been done. Alternatively, construction may have gone so far that for economic reasons it would be impractical or impossible to alter much of the basic plan. However, the policy behind NEPA that Federal agencies implement the act to the "fullest extent possible" means that plaintiffs' delay in bringing a suit should not prevent a Court from enjoining construction pending compliance if it appears that such a stay would best serve the public interest.

In the case under consideration, District Judge Keady did the balancing required from a careful analysis of the evidence and concluded that the public interest would be served by dismissing the stale claim through the imposition of *laches*. In this, the Fifth Circuit concurred, which itself is sufficient to indicate that the Fifth Circuit did not consider its prior case, *Ecology Center of Louisiana v. Coleman*, 515 F.2d 860 (5th Cir. 1975) to be authority for the proposition petitioners advance here.

In *Ecology Center*, the Fifth Circuit reversed a District Judge who granted summary judgement on the basis of *laches* without any such balancing analysis. *Ecology Center* simply held that a District Court should conduct a full evidentiary hearing in order to determine whether or not *laches* is properly invokable:

> The District Judge must have some basis for his analysis. *Laches* is not a slap on the wrist for tardiness but is made up of explicit criteria. Administrative exhaustion is not a legal automaton but rather a legal conclusion compounded of balancing specific factors. The trial court attempted no such balancing nor did he let us in on the processes by which he came to the conclusion that administrative exhaustion was the death knell for plaintiffs in this case ... On the evidence available to the District Court Judge, he should not have barred them from a trial on the merits even on the basis of *laches* or on the failure of administrative exhaustion. He should have let them present their case on each of their causes of action, save for that which dealt with delegation. 515 F.2d 872.

In the case under consideration, Judge Keady clearly followed the Fifth Circuit's direction in the handling of the authorization litigation. He let the plaintiffs present their case; he engaged in a careful balancing of the equities; and he invoked *laches* on the basis that plaintiffs clearly knew or should have known of the channel enlargement in 1966 or 1967. Eleven years and

6,000,000 dollars later constitute inexcusable prejudicial delay. The District Court's exercise of the mandated balancing and discretion was well buttressed by the Court's finding that:

> The evidence shows that the function of Waterway structures, whose design has been based upon a 300-foot-wide channel, would be compromised, and a number of structures already built would have to be reconstructed in the event the channel width was reduced to 170 feet. The evidence also shows that several highway bridges representing public works largely financed by the States of Mississippi and Alabama, are under construction; these bridges are so designed to accomodate flood stages for a 300-foot-wide Waterway and would be too low for clearance during flood stage if the channel were reduced to 170 feet. 467 F.Supp. 907. Petitioners' Appendix C, page 65a and 66a.

In completing our argument that the District and Circuit Court were correct in imposing *laches* to bar petitioners' authorization claims, we would cite one other opinion, that of a District Court. *Clark v. Volpe*, 342 F.Supp. 1324, was adopted and affirmed by the Fifth Circuit in 461 F.2d 1266 and cited with approval in the opinion of the Circuit Court now under review (Appendix B, page 9a). In that 1972 decision, the District Judge engaged in a careful and scholarly study of the doctrine of *laches* and its applicability to so-called public interest litigation. We respectfully recommend Judge West's opinion in that case to the consideration of the Supreme Court.

II. THE PROJECT UNDER CONSTRUCTION IS BEING BUILT WITHIN THE AMBIT OF CONGRESSIONAL AUTHORIZATION AS SET FORTH IN THE AUTHORIZING DOCUMENTS AND IN SUBSEQUENT ACTS OF RATIFICATION BY THE CONGRESS.

This defendant-interventor has urged in both Courts below that under the existing facts it is necessary to invoke the doctrine of *laches* to dismiss Counts I and II of the Amended Complaint because the Waterway is being built under the authority of Congress.

Section 136 of House Document of 486 defines the plan for the Waterway in the authorizing legislation. By that plan Congress told the Corps of Engineers to construct "a channel of standard dimensions to permit transit of tows of normal size without breaking formation". The uncontradicted testimony of Lieutenant General John Morris, Chief of Engineers, was that the tows of normal size in the adjacent Tennessee River were eight barge tows which would require a minimum channel width of 300 feet to transit the Tennessee-Tombigbee Waterway without breaking formation. The authorizing document for the Tennessee-Tombigbee Waterway specifically approved lock dimensions of 110 feet by 600 feet which, according to uncontradicted testimony of General Morris, can be optimized only by the use of a channel permitting eight barge tows.

By the time of 1966 Re-Study from which the channel width was enlarged, the Corps learned that tows of normal size entering this Waterway from Pickwick would require a 300-foot channel and that construction of a smaller channel would be an economic detriment to the Waterway.

It is apparent that when the authorizing legislation was passed in 1946 Congress could not specify the dimensions that would be appropriate and normal at the time of subsequent construction. Funds, in fact, were not appropriated until some 25 years later at which time the Corps correctly, and in accordance with the directive of the Secretary of the Army began constructing the Waterway in a fashion that would meet the plan set forth by the Congress in its original authorization. The Federal defendants in this case could not in good conscience construct the Waterway to any narrower channel dimensions without violating the Congressional mandate.

The argument of petitioners that construction of this Waterway to its present dimensions does violence to the principle enunciated in TVA v. Hill, *supra*, is specious. The Corps of Engineers is not doing violence to the intent of Congress but rather specifically carrying it out. The District Court pointed out not only did the Secretary of the Army communicate his decision to expand the Waterway's width to 300 feet to the authorizing committees of Congress but the Congress acted in many respects with preconstruction planning and construction planning and appropriations in the express knowledge that the Waterway would be and was being built to a width of 300 feet (Petitioner Appendix C, pages 4la through 47a).

At the trial, we introduced additional evidence that the Congress enacted authorizing legislation subsequent to the enlargement of the channel width which was based on the enlarged channel, and thereby ratified the channel as enlarged. Numerous navigation and other development projects were authorized and funded by Congress under the program generally established by the Appalachian Regional Development Act of 1965. The Tennessee-Tombigbee Waterway was specifically considered and presumed in many of these projects and its description set forth by the Appalachian Commission as containing a 300-foot-wide channel was read into the Congressional Record in the debate on the Federal Aid Highway Act on April 13, 1976 (House Record, page 3330).

The adoption of the conference report on House Resolution 8235, the Federal Aid Highway Act of 1976, specifically authorized Federal Aid to highway projects in connection with the construction of bridges and approaches to accomodate a 300-foot-wide Waterway.

Public Law 94-587 enacted October 22,1976 (90 STATS 2941) contained in Section 185 an authorizing directive for the construction of the Tennessee-Tombigbee Waterway project with special affirmative actions to encourage the use of minority owned firms (33 U.S.C. 544c). This Public Law 94-587 was an

omnibus authorizing act of the 94th Congress which, by its title, authorized the construction, repairs and preservation of certain public works on Rivers and Harbors for navigation, flood control and for other purposes. We submit that the inclusion of the Tennessee-Tombigbee Waterway in that Act was a ratification of the plan by which it was then being constructed, i.e., 300-foot-wide channel.

This court has indicated Congressional approval by ratification in the past in such cases as *United States v. Dickerson*, 310 U.S. 554, 60 S.Ct. 1034, 84 L.Ed. 1355 (1940) and *U.S. v. Southwestern Cable Company*, 392 U.S. 157, 88 994, 20 L. Ed.2d 1001.

We, therefore, conclude that the Tennessee-Tombigbee Waterway is being built in accordance with the plan originally put forth by Congress in its authorizing legislation and the Congress has ratified the authorization of the 300-foot Waterway by its subsequent knowledge, appropriations, and by its enactments.

Respectfully submitted,

TENNESSEE-TOMBIGBEE WATERWAY
DEVELOPMENT AUTHORITY,
RESPONDENT

HUNTER M. GHOLSON
GHOLSON, HICKS AND NICHOLS
SEVENTH FLOOR, COURT SQUARE
TOWERS,POST OFFICE BOX 1111
COLUMBUS,MS 39701
(601) 327-0662